FINANCIAL INSTITUTIONS COMMITTEE
Business Law Section, State Bar of California

Minutes of the Meeting of April 10, 2007

Los Angeles Special Presentation

Committee Members, Advisory Members and Others Present:
Rosie Oda, Chair
Meg Troughton, Vice Chair
Bruce Belton, Secretary
Steve Balian
Sally Brown
Joe Catalano
Leland Chan
Gino Chelleri
Andy Erskine
Gene Elerding
Bill Kroener
Teryl Murabayshi
Todd Okun
Isabelle Ord
Mary Price
Brad Seiling
Mike Zandpour

Call to Order: Our Southern California Co-Chairs Isabelle Ord and Teryl Murabayashi called the meeting to order at 9:35 a.m., convened at the LAX Airport Hilton Hotel.

1. Roll Call and Introductions: Isabelle welcomed the Committee Members, Advisory Members and Guests, and thanked them for their travel to Southern California for this meeting.

2. Check Law Update: Gene Elerding of Manatt, Phelps & Phillips, LLP provided the following update on Check Law. There have been significant changes in check law in the past ten years so it was time for an update to the check law resource materials. Gene presented his manual entitled "The Check Guide" dated April 2007, which will be available on the firm's website in the near future (Manatt.com). The manual includes the changes from the 1990's when most of the major Commercial Code section numbers were changed. He noted that we are nearing a point where Banks may have additional responsibilities for its own customers. Current law essentially defines a Bank's role as simply processing checks. But several changes have (and will) thrust new responsibilities on Banks with respect to their customer's banking activities, e.g., BSA, and Identity Theft Red Flag final rules.

Tab 1 states the general rule and the exceptions to the general rule. Typically the maker's bank is the loser on forged-maker and forged payee cases. But there are 13 possible defenses mentioned in the Guide. Tab 2 deals with forged payee checks. Usually the depositary bank ends up with responsibility. There are 16 defenses to these claims in the Guide (and there may

be more). There are also times when you need to look to the other Bank's deposit agreements to determine if there are defenses that can be asserted against the other Bank's customer.

The law is unsettled on whether a chemically cleaned check is an altered check or a forged maker check. Often times "washed" checks even have removed the maker's signature which doesn't help the perpetrator. Tab 4 is a step by step guide for operations personnel on how to respond to a claim (pages 37 through 29 contain examples of altered check declarations). The form of declaration used depends on what defenses are asserted. If more than the basic information is contained in a declaration, it gives the depository and other banks in the chain an opportunity to determine that additional defenses may be available. It is important for the institution on the losing end of these claims to get as much information as possible and try to force the other bank to give you the information.

A form of customer letter to turn down the claim is provided on page 41 and 42 of the Guide. Pages 47 and 48 contain generic release forms by everyone on the account when claims must be paid. Page 52 contains a sample hold harmless agreement (insofar as possible under Articles 3 and 4) if the customer wishes to leave the account open (or require them to use positive pay).

An adverse claim form is provided on page 54 through 56 which allows for freezing an account under certain circumstances. The Code allows for three day holds and oftentimes Bank's deposit agreements allow for the Bank itself to place a hold under certain circumstances. The form provided is in affidavit form for asserting the three day hold. Page 57 sets out a sample deposit agreement provision giving the Bank a right to freeze an account. Page 58 contains a provision allowing for freezing an account when there are customer disputes.

Tab 5 deals with timing issues, i.e., the midnight deadline and suggests a deposit agreement provision allowing for extension of the deadline which is important for protection against certain types of claims. Tab 6 addresses check kites. Check kites are easy to stop if your bank is the first in the chain.

Tab 12 contains various account terms for inclusion in a deposit agreement, e.g., customer's obligation to notify the bank if there are discrepancies, etc. Tab 14 is a UCC index in alphabetical order as a resource to find relevant sections in the Commercial Code.

3. Industrial Loan Companies. Bill Kroener of Sullivan & Cromwell made the following presentation on Industrial Loan Companies (ILC).

Industrial Loan Companies have turned into a national controversy. Industrial Banks have been in existence since 1910. They were based on providing for working men to save small amounts of money. Their origin has very little to do with current developments. The reason Industrial Bank's have suddenly become important is due to the long-time issue of the relationship between banking and commerce; the question is whether a commercial enterprise can own a banking institution? The Federal Reserve has been hostile to the combination of commerce and banking. Over the years, companies have found ways to engage in banking anyway, in part by structuring operations that avoid the definition of "bank" under the Bank Holding Company Act (i.e., taking deposits and making commercial loans), but that loophole was closed by amendment to the Act in 1987. Still, Congress permitted Industrial Banks to continue. The ability to create new Industrial Banks was grandfathered in the seven western states where they were permitted (including California, Nevada and Utah). After GLBA, the only alternative to a traditional Bank was the Industrial Loan Company charter.

ILC assets have skyrocketed from 1984 to 2006, particularly between 1995 and 1999 represented by the move of American Express' credit card portfolio to an ILC. After 1999, brokerage houses (including Merrill Lynch) swept credit balances into bank deposits at an affiliated industrial loan company. A number of auto manufacturers, and Target department store chartered ILCs. Most of the current growth has come from sweeps. Wal Mart tried to acquire an ILC in 2003 but that application was denied over much controversy.

The Federal Reserve continues to express concerns that companies owning ILCs are really Bank Holding Companies that are not governed by the Bank Holding Company Act and not appropriately regulated.

Wal Mart applied to charter a new ILC in Utah in July of 2005. Simultaneously the GAO was conducting a study to determine whether bank regulatory agencies had sufficient authority over ILCs. At the time the FDIC supervisors believed that authority was sufficient. The GAO report suggested that Congress should undertake a review. Meanwhile the Wal Mart application fueled a firestorm (notwithstanding that Target already had an ILC to run its credit card business). The Wal Mart application resulted in approximately 15,000 comments, most of which opposed the application (on post cards). Hearings were held early in 2006 producing predictable testimony.

In June 2006 the FDIC announced a moratorium on both processing of ILC applications and on the granting of insurance to ILC applications for a six month period so the matter could be studied. The moratorium expired in January and was extended again for another year to allow time for Congress to study the matter. Financial owners subject to supervision by the OTS or Fed are not subject to the moratorium.

HR 698 by Frank Gilmore, pending in the House, in general requires owners of ILCs to be supervised and regulated by the FDIC. ILC owners going forward must be 85% "financial," including assets and revenues. Two levels of grandfathering are contained in the bill, the first for ILCs owned before October 1, 2003 (so long as not acquired by another entity), and the second is for those in existence before January 28, 2007 so long as the ILC engages in no new activity and does no branching. There will be hearings in the House on April 24 or 25, but those may be postponed. The Fed will likely express the view that these should just be treated as Bank Holding Companies and regulated as such. FDIC is likely to advocate that it should be the regulator. Senator Bennett from Utah has a less sanguine view of regulating ILCs but it is unknown how this may play out in the Senate (which probably won't begin until next year).

Bills' materials are attached.

4. Model Privacy Disclosure Form – Interagency Proposal. Gino Chilleri of Union Bank of California made the following presentation on the proposed Interagency model privacy disclosure form required by GLBA. An interagency guideline was issued on March 29 (copies of which are attached hereto). The proposed model privacy form should greatly simplify the matter for consumers allowing for comparison between institutions (and to increase understanding of the ability to opt-out in the sharing of private information).

The regulation was promulgated by eight federal agencies. The rules require financial institutions to provide initial and annual privacy notices to their customers per GLBA. The model privacy form will provide a safe harbor valid for one year awaiting publication of a final rule. The current is only a proposed rule subject to comment until May 29. Institutions will have one year from the date of publication of the final rule to use the form and take advantage of the statutory

safe harbor. The proposed regulation does not require the use of the model form, however most institutions will want to avail themselves of the safe harbor.

The model form is designed to be comprehensible to consumers to have a clear format and design. The materials contain two samples: “Neptune Bank” and “Mars Bank” (fictitious banks). Neptune is one page longer than the Mars form. The difference is that Neptune provides opt-out rights to its customers. The model form is also designed to provide for clear and conspicuous disclosures (versus typical prose format in use currently by most institutions). The policy will now be presented in a tabular format on page one of each form. This presentation is deemed to be a more effective way to communicate the disclosure to consumers.

The form is also designed to enable customers to easily identify sharing practices of a financial institution and to compare privacy practices among financial institutions. The table allows a much easier comparison between various banks. Finally, the form is designed to be succinct and use an easily readable type font.

The regulation requires this notice only for consumers. Consumers must be given a reasonable opportunity to opt-out from the sharing of non-personal public information to non-affiliated third parties other than as permitted by statute. The financial institution must provide the privacy notice no later than when a customer relationship is formed and annually thereafter for as long as the relationship continues. The notice must accurately reflect the institution’s information collection and disclosure practices and must include certain other specific information.

Privacy notices have been required since July 2001, but the Agencies noted that up to now some of the notices were long, complex, difficult to understand and compare, even among the institutions that had identical privacy policies. Other than institution specific information (as described in the proposal), the content and format of the notice cannot be varied. The form will have either two or three pages depending on whether the form provides for opt-out. For those providing opt-out the form must be three pages, no longer. Each page must be printed separately and only on one side of 8-1/5 x 11 paper (allowing for viewing information on side-by-side pages). Other format requirements are specific and compliance is mandatory to obtain the safe harbor.

The form title “Facts” is mandatory and thought to make it more likely that consumers would pay attention to the form. Certain “yes” or “no” responses on the form are mandatory, but others will require customization dependent on the bank’s sharing practices. The one year permitted for the first disclosure is to avoid requirement that annual disclosures be provided outside of the normal cycle. Additional discussions were had about continued effectiveness of SB-1 in California as to affiliate sharing and whether duplicate notices would be required.

5. Climate Change Update. Teryl Murabayashi of Union Bank of California provided the following update to her presentation on climate change to the Committee on February 13, 2007. On March 19 a number of institutional investors sent a letter to Congress asking lawmakers to enact legislation to reduce greenhouse gasses by 65% by 2050. Last Monday the Supreme Court issued its opinion stating that the EPA has authority to regulate greenhouse gas emissions. The LA times published an article about nuclear power and the trending of nuclear power. A New York Times article discussed big three auto maker litigation to stop the California greenhouse gas emissions reductions legislation passed last year. We are past the tipping point. We should think about how these issues effect our institutions and our customers, e.g., from a developer standpoint, water usage, construction methods, whether there will be building moratoriums in the future. Resort and leisure industries will be effected (e.g., snow fall at ski

areas; golf course development etc.). Weather patterns may be unpredictable and transportation will also be impacted. There has been significant report and interest in these issues in the last two months and news reporting and public interest continues to grow.

6. UCP 600 and Letters of Credit. Andy Erskine of Countrywide Bank provided written materials on Uniform Customs and Practices 600, which are attached hereto. UCP 600 applies to commercial and finance letters of credit (LC), versus standby letters of credit. UCP 600 was adopted by the International Chamber of Commerce, a set of new rules for Commercial LCs, and will be effective July 1, 2007 and will replace UCP 500 adopted in 1993. Like the former, the new rules are not self executing and reference has to be incorporated into the LC in order to be effective. Absent incorporation of UCP 600 the parties are left with Article 5 of the Commercial Code (at least for letters issued in the US). ISP 98 is typically used for standby LCs.

The most significant change is in the time limit for examination of documents. When a LC is issued the beneficiary is required to present documents in order to obtain payment. UCP 600 changes the rule to an absolute period of five calendar days. Under UCP 500 the rule was a reasonable period of time, which gave rise to significant litigation. If the LC doesn't incorporate UCP 600, then Article 5 rule applies which is a reasonable period of time not to exceed seven business days.

UCP 600 also changes the options for the issuing bank in the event it wants to reject tendered documents. UCP 500 had two options: (1) issuer could reject tendered documents; or (2) hold tendered documents pending instructions from the presenter. UCP 600 adds two new options: (1) issuer can handle documents according to prior instructions provided by the presenter; or (2) issuer can hold documents presented and seek a waiver from the customer-applicant. The latter option was in use under UCP 500, but that is now clearly available under the new rules. Note that holding the documents and seeking a waiver does not extend the five day limit.

UCP 600 also requires a more formal and single notice to be presented in the event an issuer wishes to reject documents. Under pre-existing law, numerous communications could comprise the rejection leading to confusion. A single document is now required. Another change is in issuer proposed amendments. Under the former rules, an issuer might propose an amendment and get no response from the beneficiary. Under UCP 600 the beneficiary should accept or reject proposed amendments, but if they fail to do so, and documents are presented compliant with the amendment, the beneficiary will be deemed to have accepted the amendment. Thus, if an issuing bank proposes an amendment, it will be bound to that amendment even if the other party doesn't accept it.

There is a subtle distinction between UCP 500 and 600 with respect to internal inconsistencies in presenting documents. The rule of UCP 500 is that documents that appear on their face to be inconsistent with one another are deemed non-compliant. UCP 600 requires that data in a document cannot be in conflict with other data in that document or associated documents. The effective of this is likely to make more presentations compliant.

UCP 600 expands the obligation of an advising bank, one that communicates the terms of the LC to a third party. Under UCP 500 an advising bank only undertook that the credit was authentic. Under UCP 600, the advising bank is warranting that the advice is accurate. UCP 600 also slightly expands the liability of an issuer for delay in transmitting documents. UCP 500 states the general rule that the bank is not liable for consequences of delay or loss in transit of messages, letters or documents. UCP 600 adds a condition that messages must be transmitted

or sent in accordance with the requirements of the LC, or if the LC doesn't contain any such requirements, if the Bank has chosen the method of delivery.

ISP 98 should be used for standby LCs, and UCP 500 and 600 should be used for commercial LCs. The ISP permits participations and has a time for rejection of three days. UCP 600 contains a supplement that incorporates the provisions of the EUCP which relate to the presentation of electronic documents. The UCP also contains a new article defining significant credit terms and incorporates rules of interpretation established during the period UCP 500 was in use.

7. Ethics Presentation. Isabelle Ord of Sheppard Mullin and Mike Zandpour of Far East National Bank presented an ethics panel entitled "Avoiding Ethical Quagmires: In-House and Outside Counsel Perspectives on Dealing with Adverse Interests." Their slide presentation is attached hereto. Conflicts primarily implicate an attorney's duty of loyalty and confidentiality, which was the focus of their presentation. Both of these are dealt with in the California Rules of Professional Responsibility as well as the ABA Model Rules. When representing entities, the "client" is identified by the engagement letter. For in-house counsel there are inherent conflicts in managing outside counsel, acting as an employee and/or officer of the company, as well as an attorney for the company. These multiple roles raise unique conflict issues. The *Morrison* case cited in the slides, and cases following it, deal with the issue of related entities as clients. Engagement letters should be reviewed with related entities in mind to determine if there may be loyalty and confidentiality issues to be considered.

The view of who "is" the client differs depending on the perspective of inside vs. outside counsel. Outside counsel usually views the primary internal contact as the client (usually inside counsel). But the in-house counsel is not the client, nor the entities' officers or employees, but rather the entity itself. Actual conflict between inside and outside counsel is rare, but can occur when communications with a corporate officer or director might require disclosure to inside counsel. Company officers and employees should be advised that the information disclosed to the attorney is not confidential as to the officer or employee.

Rule 3-310 sets forth the rule to avoid representation with adverse interests. The rule sets forth several circumstances. From an in-house perspective when a conflict is raised by outside counsel, the entity will want to receive a thorough disclosure (relevant facts and consequences of the conflict). In the event of concurrent representation on different matters, both the entity and the other client will require conflict waivers. Inside counsel needs to facilitate the relationship with outside counsel and help to identify potential conflicts. The primary conflicts arise from concurrent representation (duty of loyalty), successive representation (duty of confidentiality) and switching employment or litigation against a former employer (both loyalty and confidentiality).

There may be circumstances where joint representation is advantageous, but clients should be advised in advance of the potential for conflicts and determine a method to resolve them before the engagement or joint representation is undertaken. It is outside counsel's responsibility to alert inside counsel to potential conflicts. If an actual conflict occurs, a waiver can be requested but may be problematic. The *First Data* case discusses this issue in more detail and addresses waivers of prospective conflicts.

Changing jobs, as the legal profession becomes more fluid, creates a unique set of conflicts. There is no absolute bar against representation against a former employer so long as the attorney does not possess confidential information obtained directly from the former

employment. The same concurrent and successive representation rules would apply to former in-house counsel. This rule may also apply to paralegals that move from one entity to another, or even an expert witness. There are cases holding that clients are not obligated to pay conflicted counsel, which may result in financial penalties as well as potential for discipline. In an extreme situation a judgment might actually be reversed.

8. Legislative Update: Bob Mulford provided the following written update of pending California legislation for the Committee's consideration:

Pending California Legislation of interest to bankers, as of April 05, 2007

AB 7 (Lieu, Saldans), as amended March 19, 2007. With Assembly Appropriations. CBA: Neutral

Would add Financial Code 22345 and 23038 to make it unlawful – as of October 1, 2007 – under the California Finance Lenders law and the California Deferred Deposit Transaction Law to violate certain provisions of the John Warner National Defense Deposit Authorization Act for Fiscal Year 2007 (on payday loans to armed forces personnel). Would also exempt from the California law prohibitions against discrimination in lending against armed forces personnel, any person who does not market or extend consumer loans to armed services members and any person who does not market deferred deposit transactions to, or enter into such transactions with, armed services members. Bill would not apply to banks.

AB 14 (Laird), as introduced December 4, 2006. With Assembly Appropriations. CBA: Neutral if amended

Civil Rights Act of 2007. Would, among many other things, amend the Song-Beverly Credit Card Act of 1971 to conform it to the Unruh Civil Rights Act, thereby adding disability, medical condition, marital status, and sexual orientation to the bases of prohibited credit card discrimination.

AB 18 (Blakesleee), as amended March 19, 2007. With Assembly Appropriations. CBA: Oppose priority 3 unless amended.

Would amend Civil Code 14, add Civ. C. 17, and amend various provisions in other codes, on signature stamps made by persons who because of physical disabilities cannot write. Persons and agencies would have to accept such a stamp (when made in the presence of the agency or person requiring the signature) the same as a written signature, but could require photo IDs.

AB 20 (Eng, Hernandez), as introduced December 4, 2006.

Spot bill on health care coverage for all working Californians and their families.

Other bills on health care coverage:

AB 75 (Blakeslee), as introduced December 4, 2006

SB 48 (Perata), as introduced Jan. 3, 2007. To Senate Health. Hearing scheduled April 25, 2007

AB 36 (Niello), as introduced December 4, 2006. To Assembly Public Employees, Retirement & Social Security. CBA: Neutral

Would add Education Code 221010 and Government Code 20085 et seq. and 31455.5 to criminalize the making of false material statements re public employee retiree benefits or applications, or to knowingly accept public employee retiree benefits while knowing he/she is not entitled thereto. Jail, fines, and restitution.

AB 70 (Jones), as amended February 21, 2007. With Assembly Judiciary. Hearing scheduled April 17, 2007. CBA: No position

Would add Water Code 8460 et al to subject a city or county to joint liability for flood damage that occurs when a flood control project fails to function as intended in an area historically subject to flooding.

Other bills on water or flood control or disaster relief include:

AB 5 (Wolk), as introduced December 4, 2006. With Assembly Water, Parks & Wildlife. Hearing scheduled April 10, 2007

AB 26 (Nakanishi), as amended March 19, 2007. With Assembly Appropriations

AB 41 (La Malfa), as introduced December 4, 2006

AB 62 (Nava), as amended February 22, 2007. With Assembly Local Government. Hearing scheduled April 11, 2007

AB 156 (Laird), as introduced January 18, 2007. With Assembly Water, Parks & Wildlife. Hearing scheduled April 10, 2007. CBA: Support priority 3

SB 05 (Machado), as amended March 26, 2007. With Senate Natural Resources. Hearing scheduled April 10, 2007

SB 06 (Oropeza), as introduced December 4, 2006. With Senate Local Government. Hearing scheduled April 18, 2007

SB 17 (Florez), as introduced December 4, 2006. With Senate Natural Resources. Hearing scheduled April 24, 2007

SB 34 (Torlakson), as amended March 20, 2007. With Senate Natural Resources. Hearing scheduled April 24, 2007

SB 59 (Cogdill), as introduced January 11, 2007. With Senate Natural Resources. Hearing scheduled April 24, 2007

AB 71 (Dymally), as amended December 4, 2006. To Assembly Labor & Employment

Would amend Labor Code 1182.12 to index the minimal wage on an annual basis to the rate of inflation.

AB 78 (Torrico), as amended March 14, 2007. With Assembly Elections & Redistricting. CBA: Oppose priority 1

Would amend and add various provisions of the Government Code to require that any committee regulated by the Political Reform Act of 1970 establish an account to include all contributions to a candidate, etc., with interest paid to the State Treasury, to be used by the Fair Political Practices Commission to enforce the Political Reform Act. A candidate-controlled committee could opt out of this requirement by paying the FPPC $ 5,000.

AB 150 (Lieu), as amended March 26, 2007. With Assembly Education. Hearing scheduled April 25, 2007

Would add Education Code 52980 et seq., the California Financial Literacy Initiative.

AB 245 (DeVore), as introduced February 1, 2007. With Assembly Revenue & Taxation. Hearing scheduled April 30 2007. CBA: Neutral

Would add and amend various provisions to the Revenue and Taxation Code to allow deductions for health savings account in conformity with federal law.

AB 267 (Calderon), as amended March 29, 2007. With Assembly Insurance. Hearing scheduled April 11, 2007. CBA: Support priority 3

Would add Insurance Code 784.50 et seq. to require any insurance producer agent or insurer who pitches an annuity to a senior (age 65 or older) consumer to have reasonable grounds for believing that the annuity is suitable for that consumer.

AB 703 (Ruskin), as introduced February 22, 2007. With Assembly Judiciary. Hearing scheduled April 17, 2007. CBA: Oppose priority 2

Would add Civil Code 1798.555 to prohibit using a social security number as an identified except when required by federal law. Any records with such numbers must be either encrypted or stored under lock and key, and when destroyed, done so through cross-cut shredding or some other manner that protects confidentiality.

AB 1168 (Jones), as amended March 29, 2007. With Assembly Judiciary. Hearing scheduled April 10, 2007. CBA: Oppose unless amended priority 2

Would add Civil Code 1798.88, Education Code 66018.5, and Government Code 15705 to, among other things, prohibit public disclosure by any local agency of any record that displays more than the last four digits of any social security number.

AB 1229 (Carter), as introduced February 23, 2007. With Assembly Public Safety. Hearing scheduled April 10, 2007. CBA: Support priority 1

Would add Penal Code 466.4 to make it a misdemeanor to possess an ATM card trapping device.

AB 1301 (Gaines), as introduced February 23, 2007. With Assembly Banking & Finance. Hearing scheduled April 30, 2007.

Would repeal Financial Code 753 and amend Fin.C. 3516, to require Commissioner approval before any bank could deposit any of its funds with another corporation.

AB 1313 (Calderon), as introduced February 23, 2007. CBA: Support priority 3

Spot bill re credit card cancellation.

AB 1418 (Arambula), as introduced February 23, 2007. CBA: Support

Would add Financial Code 14158, 14258, and 14835 to require the establishment of community reinvestment policies and objectives for credit unions.

SB 11 (Migden), as introduced December 4, 2006. To Senate Judiciary

Would amend Family Code 297 and Probate Code to eliminate the requirement that domestic partnerships be same sex.

SB 30 (Simitian), as introduced December 4, 2006. With Senate Public Safety, after getting a do-pass (3-2) from Senate Judiciary. CBA: Oppose priority 3

Identity Identification Protection Act of 2007.

SB 31 (Simitian), as amended March 20, 2007. To Senate Public Safety. CBA: Neutral

Would add Civil Code 1798.79 et al to make it a misdemeanor to remotely read (or attempt to remotely read) a person's ID document via radio waves, without the person's knowledge and prior consent.

SB 129 (Kuehl), as amended March 15, 2007. With Senate Public Safety. Held in committee without recommendation, March 27, 2007. CBA: Oppose priority 3 unless amended

Would amend Penal Code 653m to increase the penalties for intentionally annoying telephone calls, etc., if the call is in violation of a protective order, if the caller and callee have a specified relationship, or if a person knowingly permits a telephone, etc., under the person's control to be used for a prohibited purpose.

SB 270 (McClintock), as introduced February 15, 2007. With Senate Judiciary. Do-pass (5-0). CBA: Support priority 3

Would amend Code of Civil Procedure 1513 through 1521 on unclaimed property. Among other things, abandoned property held by a bank would escheat after 7 years instead of 3 years. Also, banks would have to send notices to apparent owners of safe deposit boxes concerning escheat.

SB 294 (Ackerman), as introduced February 15, 2007. With Senate Judiciary. Hearing scheduled March 27, 2007, cancelled at request of author.

Would amend Corporations Code 1502, 1502.1, 2117, and 2117.1 to excuse a publicly traded corporation from having to file certain reports with the Secretary of State if the corporation has a central index key that enables anyone to obtain information about that corporation from the SEC.

NOTE: This bill is being pushed by the State Bar's Corporations Committee. The CBA has suggested that an exception also be provided for "publicly traded banks" that file reports with the Fed, FDIC, and/or OCC. The Corporations Committee has tentatively decided not to support such an amendment, since the data submitted by such banks (essentially, banks that are not part of bank holding companies) may not be the equivalent to the data filed by publicly-traded corporations with the SEC, and since the bank data may not be as easily accessible to the public. The Corporations Committee would like to receive the reaction of the Financial Institutions Committee – or of any of its members – to this issue.

SB 385 (Machado), as amended March 26, 2007. With Senate Banking, Finance & Insurance. Hearing scheduled April 18, 2007.

Would add Business Professions Code 10240.3, Financial Code 215.5, 22169, and 50333, and Government Code 13984 to require state-licensed mortgage lenders and brokers to comply with the (federal) Interagency Guidance on Nontraditional Mortgage Product Risks and with the guidance on nontraditional mortgage products issued by the Conference of State Bank Supervisors and the American Association of Residential Mortgage Regulators.

SB 388 (Corbett), as amended March 29, 2007. With Senate Judiciary. Hearing scheduled April 10, 2007. CBA: Oppose unless amended priority 2

Would add Civil Code 60 et seq on radio frequency identification (RFID) tags. Any person or private entity that sells or issues a card with an RFID tag that is capable of being scanned for the cardholder's personally identifiable information must give certain information to the recipient. A recipient cardholder who is not so informed can sue for $1,000 or actual damages.

SB 461 (Ashburn), as introduced February 21, 2007. To Senate Public Employment and Retirement. CBA: Neutral if amended

Would add Government Code 7513.4 and 16642.5 to prohibit the Public Employees' Retirement System and the California State Teachers' Retirement System from investing public employment retirement finds in any company with business operations in a foreign terrorist state.

SB 596 (Harman), as introduced February 22, 2007. To Senate Judiciary. First hearing cancelled at request of author. CBA: Oppose priority 2

Would add Business & Professions Code 22949 et seq. to require that any computerized payment system sold in California as new include antisniffer protection. A sniffer is a program or device that monitors data traveling over a computer network.

SB 638 (Romero), as introduced February 22, 2007. With Senate Banking and Insurance. CBA: Oppose priority 1 unless amended

Would amend Financial Code 14800 to allow state-chartered credit unions to offer lifeline banking (i.e., to sell money orders and to cash checks and money orders and receive electronic finds transfers) for persons not in their field of membership.

SB 729 (Padilla), as introduced February 23, 2007. To Senate Judiciary. CBA: Oppose unless amended priority 2

Would add Business & Professions Code 17537.12 to prohibit sending of unsolicited promotional checks of less than $30 that, when endorsed, require the endorser to pay for goods or services.

SB 752 (Steinberg), as introduced February 23, 2007. With Senate Revenue & Taxation. Hearing scheduled April 25, 2007. CBA: No position

Would add Government Code 99100 and Revenue & Taxation Code 17140.1, the California Kids Investment and Development Savings (KIDS) Account Ac. Every child born in California on and after January 1, 2008, would get a $ 500 investment account with the State Treasury.

SB 1037 (Committee on Banking….), as introduced February 27, 2007. With Senate Banking, Finance & Insurance. Hearing scheduled April 18, 2007.

Would amend Financial Code 350, 697, 708, 1450, 1501.2, 1521, and 1522, and add Fin.C. 691.1 on corporate securities activities of banks, and exempting certain trust businesses from meeting certain requirements.

Bob Mulford, April 5, 2007

9. Open Meeting, Other Items of Interest: Meg Troughton reported that the IOLTA proposal will be discussed at the Annual Meeting.

10. Adjournment. The meeting was adjourned at 12:00. Next meeting: May 8, 2007 in San Francisco, with video conferencing available at the usual locations per the agenda to be prepared.

Agenda Item 3

Financial Institutions Committee
Business Law Section, State of California
April 10, 2007
Presentation on Industrial Loan Companies

William F. Kroener, III
Sullivan & Cromwell LLP

I. Background
- A. History of Charter
- B. Commerce and Banking Issues
  (bhc's, nonbanks, diversified thrift, holding companies, now ilc's)
- C. ILC's now major remaining method of commercial ownership
- D. Available in only seven western states, especially Utah

II. Current Controversy
- A. Mix of Owners – Commercial, Industrial, Finance (see Attachment 1)
- B. Rapid Recent Growth (see Attachment 2)
  - -- Amex 1996 move
  - -- ML 1999 sweeps
  - -- 63% of growth from sweeps
- C. Wal-Mart Application (7/05) and Home Depot Notice (5/06)
- D. Fed Concerns --

III. Current Developments
- A. FDIC Moratorium I
  - -- July 2006-January 2007
  - -- No processing, no delegation
  - -- GM/GMAC exception
  - -- Request for comments produced approximately 12,500
- B. FDIC Moratorium II
  - -- January 2007-January 2008
  - -- Same as Moratorium I for Commercial Owners
  - -- Financial Owners subject to Proposed Rule (exams, maintenance of liquidity and capital)
  - -- Consolidated Bank Supervised Owners OK
- C. Frank-Gilmour Bill in House (H.R. 698)
  - -- generally hc registration, reporting and exams by FDIC
  - -- owner must meet 85% Financial Test
  - -- 2 levels of grandfathering – pre-10/1/03 and more limited pre-1/29/07
  - -- Hearings in House now postponed to later in April
- D. Senate
  - -- Question is what does Senator Bennett do?

Attachment 1

Industrial Loan Companies (Financial Data as of March 31, 2006, in millions)					
Insured	Institution	Total Assets	Total Deposits	State	Parent
10/31/1988	MERRILL LYNCH BANK USA	62,040.4	54,160.1	UT	Merrill Lynch
9/15/2003	UBS BANK USA	18,998.6	16,415.7	UT	UBS AG
3/20/1989	AMERICAN EXPRESS CENTURION BANK	13,779.7	2,725.8	UT	American Express
9/24/1984	FREMONT INVESTMENT&LOAN	12,856.5	9,297.1	CA	Fremont General Corporation
5/25/1990	MORGAN STANLEY BANK	10,884.9	7,702.5	UT	Morgan Stanley
9/27/1996	USAA SAVINGS BANK	6,851.6	256.4	NV	USAA Life Company
4/1/2003	GMAC COMMERCIAL MORTGAGE BANK	3,991.4	3,220.0	UT	GMACCH Invest / GMAC
8/24/05	LEHMAN BRO. COMMERCIAL BANK	3,338.2	2,899.9	UT	Lehman Brothers Bank FSB
8/2/2004	GMAC AUTOMOTIVE BANK	3,060.6	2,573.1	UT	GMAC (General Motors)
8/2/2004	BEAL SAVINGS BANK	2,245.6	153.9	NV	Beal Financial Corporation
11/12/1999	BMW BANK OF NORTH AMERICA	1,863.4	1,511.9	UT	BMW Group
2/12/1993	GE CAPITAL FINANCIAL INC	1,812.0	246.6	UT	GE (General Electric)
12/16/1991	ADVANTA BANK CORP	1,552.8	1,065.9	UT	Advanta
10/5/1984	FIRESIDE BANK	1,310.7	1,084.9	CA	Unitrin, Inc.
10/20/2000	CIT BANK	933.7	693.4	UT	CIT Group
9/22/1997	MERRICK BANK	736.2	551.8	UT	CardWorks, LP
6/1/1998	WRIGHT EXPRESS FINL SERVICES	694.5	524.3	UT	Wright Express
11/3/1989	CENTENNIAL BANK	691.0	555.3	CA	Land America Financial Group
1/10/2002	VOLKSWAGEN BANK USA	684.8	546.6	UT	Volkswagen
6/4/1984	FINANCE FACTORS, LTD	655.6	499.1	HI	Finance Enterprises
1/16/1998	PITNEY BOWES BANK INC	553.0	470.0	UT	Pitney Bowes
9/12/1985	UNIVERSAL FINANCIAL CORP	535.2	376.1	UT	Citigroup
8/29/1991	TAMALPAIS BANK	469.1	326.5	CA	No affiliation
8/26/1988	SILVERGATE BANK	412.4	180.5	CA	Silvergate Capital
11/12/1999	REPUBLIC BANK INC	357.9	285.9	UT	No affiliation
10/1/1998	TRANSPORTATION ALLIANCE BK	334.7	278.4	UT	Flying J, Inc.
9/10/1985	COMMUNITY COMMERCE BANK	296.4	206.2	CA	TELACU
12/22/2003	MEDALLION BANK	259.0	215.0	UT	Medallion Financial
4/3/2000	SECURITY STATE SAVINGS BANK	222.4	118.4	NV	Stampede Capital LLC
9/22/2004	INDEPENDENCE BANK	205.5	136.2	CA	Independence Financial Services
11/5/1985	5 STAR BANK	201.6	144.6	CO	Armed Forces Benefit Association
12/1/2003	WORLD FINANCIAL CAPITAL BANK	196.3	131.2	UT	Alliance Data Systems
6/3/1985	HOME BANK OF CALIFORNIA	173.5	130.7	CA	La Jolla Savers and Mortgage Fund
1/22/1990	CIRCLE BANK	173.4	133.7	CA	No affiliation
7/3/1986	BALBOA THRIFT & LOAN ASSN	152.3	136.0	CA	No affiliation
7/21/2003	EXANTE BANK	140.9	85.6	UT	UnitedHealth Group
9/29/05	MAGNET BANK	137.6	78.8	UT	Unaffiliated
6/28/1989	FIRST SECURITY THRIFT CO	137.2	83.8	CA	First American Financial
7/21/1987	FIRST FINANCIAL BANK	137.0	26.8	CO	First Data Corp.
2/25/1986	GOLDEN SECURITY BANK	124.2	101.4	CA	No affiliation
12/17/1984	FINANCE & THRIFT CO	113.6	114.6	CA	F&T Financial Services, Inc.
11/28/05	SALLIE MAE BANK	102.5	1.0	UT	Sallie Mae
12/17/1984	RANCHO SANTA FE TH & L ASSN	99.4	69.8	CA	First Trust Savings Bank
6/3/2002	ENERBANK	91.3	77.7	UT	CMS Energy
3/1/2001	CELTIC BANK	74.0	64.0	UT	Celtic Investment, Inc.
3/23/1990	THE MORRIS PLAN COMPANY	61.9	46.7	IN	First Financial Corporation
9/28/1987	HOME LOAN INDUSTRIAL BANK	54.9	44.0	CO	Home Loan Investment Company
8/16/2004	TOYOTA FINANCIAL SAVINGS BANK	53.9	15.1	NV	Toyota
2/16/1990	TUSTIN COMMUNITY BANK	48.4	36.9	CA	No affiliation
11/3/1999	ESCROW BANK USA	39.4	0.8	UT	GMACCH Invest / GMAC

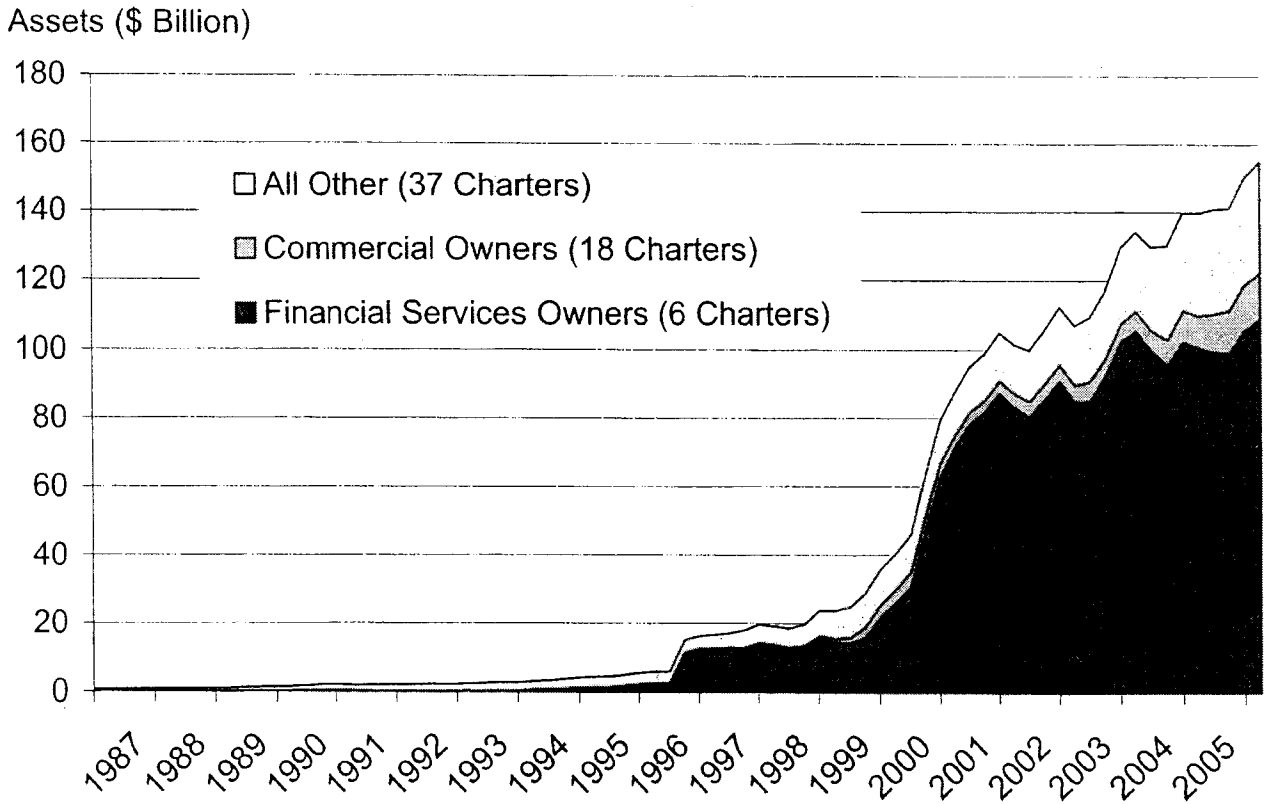
Industrial Loan Companies (Continued)					
Insured	Institution	Assets	Deposits	State	Parent
8/25/1997	EAGLEMARK SAVINGS BANK	32.2	3.6	NV	Harley-Davidson
8/1/05	ALLEGIANCE DIRECT BANK	26.1	20.1	UT	Leavitt Group Enterprises, Inc.
8/7/1986	MINNESOTA 1ST CREDIT & SVG INC	25.0	18.1	MN	Minnesota Thrift Company
7/6/2004	GOLDMAN SACHS BANK USA	22.0	0.5	UT	Goldman Sachs
10/5/2000	FIRST ELECTRONIC BANK	13.6	9.2	UT	Fry's Electronics
9/27/2004	TARGET BANK	12.3	5.4	UT	Target Corporation
5/15/1997	WEBBANK	6.6	1.0	UT	Steel Partners II, LP
1/26/06	LCA BANK CORPORATION	5.4	0.2	UT	Lease Corporation of America
9/22/1997	AMERICAN SAVINGS INC	3.7	0.9	MN	Waseca Bancshares
5/1/2000	VOLVO COML CREDIT CORP OF UT	2.8	0.5	UT	Volvo
1/12/2001	TRUST INDUSTRIAL BANK	2.7	0.5	CO	FISERV
		155,093.5	**110,860.7**		

Pending Applications for Deposit Insurance					
Insured	Institution	Assets	Deposits	State	Parent
NA	COMDATA BANK	NA	NA	UT	Ceridian Corporation
NA	DAIMLERCHRYSLER BANK US	NA	NA	UT	DaimlerChrysler
NA	CAPITALSOURCE BANK	NA	NA	UT	CapitalSource, Inc.
NA	WAL-MART BANK	NA	NA	UT	Wal-Mart
NA	MARLIN BUSINESS BANK	NA	NA	UT	Marlin Business Services, Corp.
NA	AMERICAN PIONEER	NA	NA	UT	City Financial
NA	HEALTHCARE BANK	NA	NA	UT	Blue Cross/Blue Shield
NA	BERKSHIRE HATHAWAY BANK	NA	NA	UT	Berkshire Hathaway
NA	FIFTH STREET BANK	NA	NA	NV	Security National Master Holding Company

Pending Notices of Change In Bank Control					
Insured	Target Institution	Assets	Deposits	State	Acquiring Entity
8/2/2004	GMAC AUTOMOTIVE BANK	3,060.6	2,573.1	UT	Cerberus
9/22/1997	MERRICK BANK	736.2	551.8	UT	Compu-Credit
8/26/1988	SILVERGATE BANK	412.4	180.5	CA	WESCOM Credit Union
6/3/2002	ENERBANK	91.3	77.7	UT	The Home Depot
5/1/2000	VOLVO COML CREDIT CORP OF UTAH	2.8	0.5	UT	NHB Holdings, Inc.

Attachment 2

ASSETS OF 61 FDIC-INSURED ILCs, 1986 - 2006



Example 1. Neptune Model Privacy Form

FACTS	WHAT DOES NEPTUNE DO WITH YOUR PERSONAL INFORMATION?
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: ▪ Social Security number and income ▪ account balances and payment history ▪ credit history and credit scores When you close your account, we continue to share information about you according to our policies.
How?	All financial companies need to share customers' personal information to run their everyday business—to process transactions, maintain customer accounts, and report to credit bureaus. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons Neptune chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does Neptune share?	Can you limit this sharing?
For our everyday business purposes— to process your transactions, maintain your account, and report to credit bureaus	Yes	No
For our marketing purposes— to offer our products and services to you	Yes	No
For joint marketing with other financial companies	Yes	No
For our affiliates' everyday business purposes— information about your transactions and experiences	Yes	No
For our affiliates' everyday business purposes— information about your creditworthiness	Yes	Yes *(Check your choices, p. 3)*
For our affiliates to market to you	Yes	Yes *(Check your choices, p. 3)*
For nonaffiliates to market to you	Yes	Yes *(Check your choices, p. 3)*

Contact Us	Call 1-800-XXX-XXXX or go to www.neptune.com/privacy

FACTS	WHAT DOES NEPTUNE DO WITH YOUR PERSONAL INFORMATION?

Sharing practices	
How often does Neptune notify me about their practices?	We must notify you about our sharing practices when you open an account and each year while you are a customer.
How does Neptune protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings.
How does Neptune collect my personal information?	We collect your personal information, for example, when you ▪ open an account or deposit money ▪ pay your bills or apply for a loan ▪ use your credit or debit card We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.
Why can't I limit all sharing?	Federal law gives you the right to limit sharing only for ▪ affiliates' everyday business purposes—information about your creditworthiness ▪ affiliates to market to you ▪ nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing.

Definitions	
Everyday business purposes	The actions necessary by financial companies to run their business and manage customer accounts, such as ▪ processing transactions, mailing, and auditing services ▪ providing information to credit bureaus ▪ responding to court orders and legal investigations
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ▪ *Our affiliates include companies with a Neptune name; financial companies, such as Orion Insurance; and nonfinancial companies, such as Saturn Marketing Agency.*
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ▪ *Nonaffiliates we share with can include mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations*
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ▪ *Our joint marketing partners include credit card companies.*

F A C T S	**WHAT DOES NEPTUNE DO WITH YOUR PERSONAL INFORMATION?**

If you want to limit our sharing

Contact us	**By telephone:** 1-800-XXX-XXXX— our menu will prompt you through your choices **On the web:** www.neptune.com/privacy **By mail:** mark your choices below, fill in and send form to: Neptune Privacy Department PO Box 00000 City, State 00000 **Unless we hear from you, we can begin sharing your information 30 days from the date of this letter. However, you can contact us at any time to limit our sharing.**

Check your choices

Your choices will apply to everyone on your account.

Check any/all you want to limit: *(See page 1)*

- ☐ Do not share information about my creditworthiness with your affiliates for their everyday business purposes.
- ☐ Do not allow your affiliates to use my personal information to market to me. *(I will receive a renewal notice for this use for marketing in 5 years.)*
- ☐ Do not share my personal information with nonaffiliates to market their products and services to me.

[redacted]

Mail to:

Neptune
Privacy Department
PO Box 00000
City, State 00000

Example 2. Mars Model Privacy Form

F A C T S	**WHAT DOES MARS DO WITH YOUR PERSONAL INFORMATION?**
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: ▪ Social Security number and income ▪ account balances and payment history ▪ credit history and credit scores When you close your account, we continue to share information about you according to our policies.
How?	All financial companies need to share customers' personal information to run their everyday business—to process transactions, maintain customer accounts, and report to credit bureaus. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons Mars chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does Mars share?	Can you limit this sharing?
For our everyday business purposes— to process your transactions, maintain your account, and report to credit bureaus	Yes	No
For our marketing purposes— to offer our products and services to you	Yes	No
For joint marketing with other financial companies	No	We don't share
For our affiliates' everyday business purposes— information about your transactions and experiences	No	We don't share
For our affiliates' everyday business purposes— information about your creditworthiness	No	We don't share
For our affiliates to market to you	No	We don't share
For nonaffiliates to market to you	No	We don't share

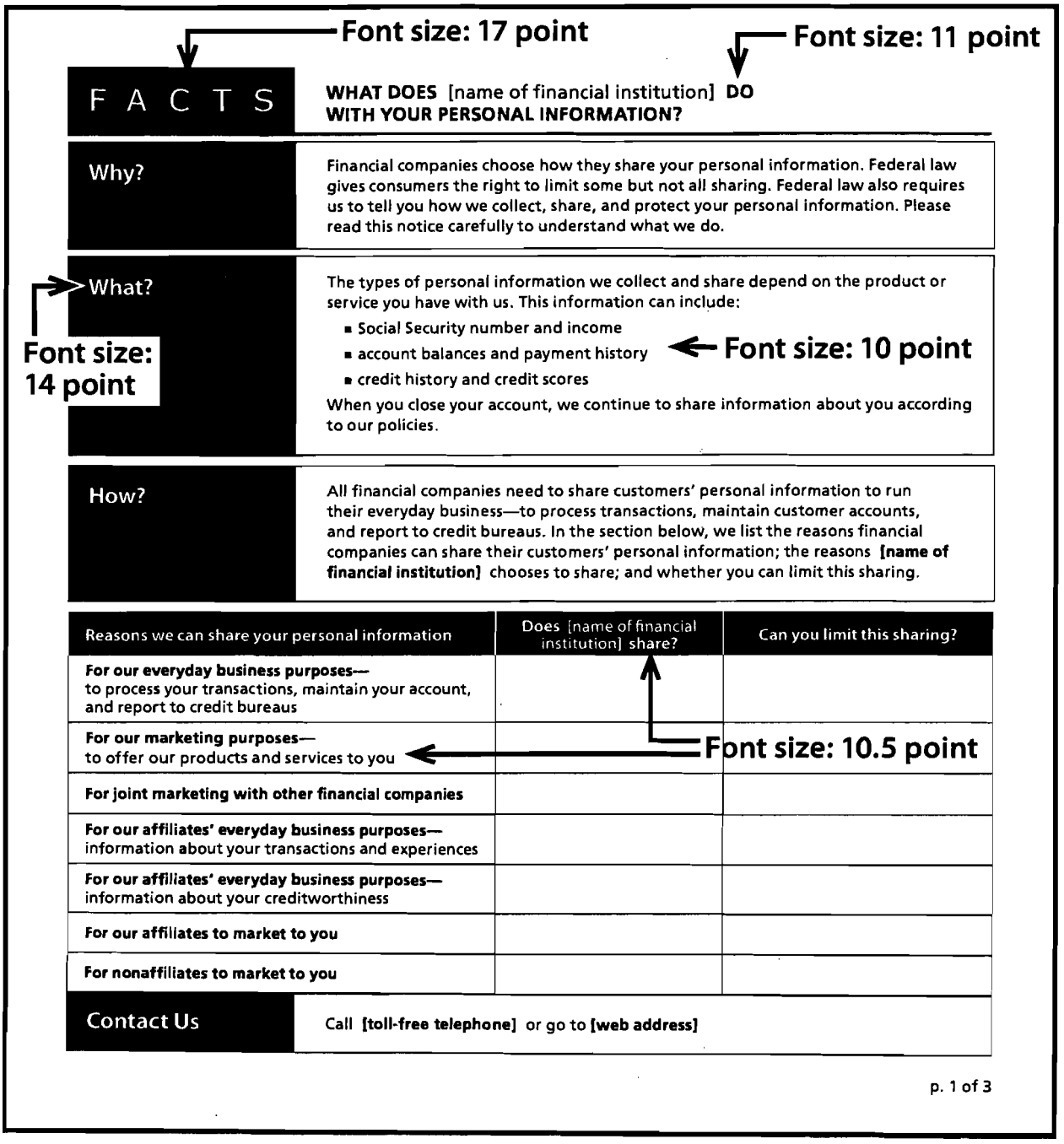
Contact Us	Call 1-800-XXX-XXXX or go to www.marsfi.com/privacy

F A C T S	**WHAT DOES MARS DO WITH YOUR PERSONAL INFORMATION?**

Sharing practices	
How often does Mars notify me about their practices?	We must notify you about our sharing practices when you open an account and each year while you are a customer.
How does Mars protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings.
How does Mars collect my personal information?	We collect your personal information, for example, when you ▪ open an account or deposit money ▪ pay your bills or apply for a loan ▪ use your credit or debit card We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.
Why can't I limit all sharing?	Federal law gives you the right to limit sharing only for ▪ affiliates' everyday business purposes—information about your creditworthiness ▪ affiliates to market to you ▪ nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing.

Definitions	
Everyday business purposes	The actions necessary by financial companies to run their business and manage customer accounts, such as ▪ processing transactions, mailing, and auditing services ▪ providing information to credit bureaus ▪ responding to court orders and legal investigations
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ▪ *Mars has no affiliates.*
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ▪ *Mars does not share with nonaffiliates so they can market to you.*
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ▪ *Mars doesn't jointly market.*

Example 3. Illustration of Type Size for the Various Elements of the Model Form [25]



B. Page One—Background Information and the Disclosure Table

Page one of the proposed model form has four parts: (1) The title; (2) an introductory section called the "key frame," which provides context to help the consumer better understand the required disclosures; (3) a table that describes the types of sharing Federal law allows, which of those types of sharing the institution actually does, and whether the consumer can opt out of any type of the institution's sharing; and (4) the institution's contact information.

The research showed that the title, "FACTS What Does [name of financial

[25] *See infra* note and accompanying text. This illustration displays the font sizes of the various elements in the model form.

F A C T S	WHAT DOES [name of financial institution] DO WITH YOUR PERSONAL INFORMATION?

If you want to limit our sharing	
Contact us	**By telephone: [toll-free telephone] — our menu will prompt you through your choices** **On the web: [web address]** **By mail: mark your choices below, fill in and send form to:** **[mailing address]** **Unless we hear from you, we can begin sharing your information 30 days from the date of this letter. However, you can contact us at any time to limit our sharing.**

Check your choices	
Your choices will apply to everyone on your account.	**Check any/all you want to limit:** *(See page 1)* ☐ **Do not share information about my creditworthiness with your affiliates for their everyday business purposes.** ☐ **Do not allow your affiliates to use my personal information to market to me.** *(I will receive a renewal notice for this use for marketing in 5 years.)* ☐ **Do not share my personal information with nonaffiliates to market their products and services to me.**

[redacted]		**Mail to:**
[redacted]		**[mailing address]**
[redacted]		

p. 3 of 3

B. General Instructions

1. How the Model Privacy Form Is Used

The model form may be used, at the option of a financial institution, including a group of financial holding company affiliates that use a common privacy notice, to meet the content requirements of the privacy notice and opt-out notice set forth in sections 40.6 and 40.7 of this part.

(Note that disclosure of certain information, such as assets, income, and information from a consumer reporting agency, may give rise to obligations under the Fair Credit Reporting Act [15 U.S.C. 1681–1681x] (FCRA), such as a requirement to permit a consumer to opt out of disclosures to affiliates or designation as a consumer reporting agency if disclosures are made to nonaffiliated third parties.)

2. The Contents of the Model Privacy Form

The model form consists of two or three pages, depending on whether a financial institution shares in a manner that requires it to provide a third page with opt-out information.

(a) *Page One.* The first page consists of the following components:

(1) The title.

(2) The key frame (Why?, What?, How?).

(3) The disclosure table ("Reasons we can share your personal information").

(4) Contact information.

(b) *Page Two.* The second page consists of the following components:

(1) The title.

(2) The Frequently Asked Questions on sharing practices.

(3) The definitions.

(c) *Page Three.* The third page consists of a financial institution's opt-out form.

3. The Format of the Model Privacy Form

The model form is a standardized form, including page layout, page content, format, style, pagination, and shading. No other information may be included in the model form, and the model form may be modified only as described below.

(a) *Easily readable type font.* Financial institutions that use the model form must use an easily readable type font. Easily readable type font includes a minimum of 10-point font and sufficient spacing between the lines of type.

(b) *Logo.* A financial institution may include a corporate logo on any page of the notice, so long as it does not interfere with the readability of the model form or the space constraints of each page.

(c) *Page size and orientation.* Each page of the model form must be printed on one side of an 8.5 by 11 inch paper in portrait orientation.

(d) *Color.* The model form may be printed on white or light color paper (such as cream) with black or suitable contrasting color ink. Spot color may be used to achieve visual interest, so long as the color contrast is distinctive and the color does not detract from the readability of the model form.

C. Information Required in the Model Privacy Form

The model form is a standardized form, and institutions seeking to obtain the safe harbor through use of the model form may modify the form only as described below:

1. Name of the Institution or Group of Affiliated Institutions Providing the Notice

Include the name of the financial institution or group of affiliated institutions providing the notice on the form wherever [name of financial institution] appears. Contact information, such as the institution's toll-free telephone number, Web address, or mailing address, or other contact information, should be inserted as appropriate, wherever [toll-free telephone] or [web address] or [mailing address] appear.

2. Page One

(a) *General instructions for the disclosure table.* There are reasons for sharing or using personal information listed in the left column of the disclosure table. Each of these reasons correlates to certain legal provisions described below. In the middle column, each institution must provide a "Yes" or "No" response in each box that accurately reflects its information sharing policies and practices with respect to the reason listed on the left. Each institution also must complete each box in the right column as to whether a consumer can limit such sharing. If an institution answers "No" to sharing for a particular reason in the middle column, it must answer "We don't share" in the corresponding right column. If an institution answers "Yes" to sharing for a particular reason in the middle column, it must, in the right column, answer either "No" if it does not offer an opt-out or "Yes (Check your choices, p.3)" if it does offer an opt-out. Except for the sixth row ("For our affiliates to market to you"), an institution must list all reasons for sharing, and complete the middle and right columns of the disclosure table.

(b) *Specific disclosures and corresponding legal provisions.*

(1) *For our everyday business purposes.* Because all financial institutions share information for everyday business purposes, as contemplated by sections 40.14 and 40.15 of this part, the financial institution must answer "Yes" to the sharing of such information and "No" to the availability of an opt-out.

(2) *For our marketing purposes.* The financial institution must answer "Yes" or "No" in the middle column. An institution that does not share for this reason must answer "We don't share" in the right column. An institution that shares for this reason may or may not elect to provide an opt-out and must provide the corresponding answer in the right column as described in paragraph C.2.(a) of this Instruction. This provision includes service providers contemplated by section 40.13 of this part.

(3) *For joint marketing with other financial companies.* As contemplated by section 40.13 of this part, the financial institution must answer "Yes" or "No" in the middle column. An institution that does not share for this reason must answer "We don't share" in the right column. An institution that shares for this reason may or may not elect to provide an opt-out and must provide the corresponding answer in the right column as described in paragraph C.2.(a) of this Instruction.

(4) *For our affiliates' everyday business purposes—information about transactions and experiences.* This provision applies to sharing of certain information with an institution's affiliates, as contemplated by sections 603(d)(2)(A)(i) and (ii) of the FCRA. The financial institution must answer "Yes" or "No" in the middle column. An institution that does not share for this reason must answer "We don't share" in the right column. An institution that does not have any affiliates will also use this answer. Institutions that share for this reason may or may not elect to provide an opt-out and must provide the corresponding answer in the right column as described in paragraph C.2.(a) of this Instruction.

(5) *For our affiliates' everyday business purposes—information about creditworthiness.* This provision applies to the sharing of certain information with an institution's affiliates, as contemplated by section 603(d)(2)(A)(iii) of the FCRA. The financial institution must answer "Yes" or "No" in the middle column. An institution that does not share for this reason must answer "We don't share" in the right column. An institution that does not have any affiliates will also use this answer. Institutions that share for this reason must provide an opt-out and must provide the appropriate answer in the right column as described in paragraph C.2.(a) of this Instruction.

(6) *For our affiliates to market to you.* This provision applies to information shared among affiliates that is used by those affiliates for marketing, as contemplated by section 624 of the FCRA. Following the effective date of the rules implementing section 624, institutions that elect to incorporate this provision into the model form to satisfy their obligations under this part must include this reason for sharing as set forth in the model form in order to obtain the benefit of the safe harbor. Institutions whose affiliates receive such information and use it for marketing must answer "Yes" in the middle column, and "Yes (Check your choices, p.3)" in the right column corresponding to the availability of an opt-out. Institutions whose affiliates receive such information and do not use it for marketing may elect to include this provision in the model form and answer "No" in the middle column and "We don't share" in the right column; however, institutions whose affiliates receive such information and do not use it for marketing are not required to use this provision. Institutions that do not have affiliates and elect to include this provision in their notice will answer "No" in the middle column and "We don't share" in the right column.

(7) *For nonaffiliates to market to you.* This provision applies to sharing under sections 40.7 and 40.10(a) of this part. Financial institutions that do not share for this reason must answer "No" in the middle column and "We don't share" in the right column. Financial institutions that do share for this reason must answer "Yes" in the middle column and "Yes (check your choices, p. 3)" corresponding to the availability of an opt-out.

(8) *Additional opt-outs.* A financial institution may customize the model form to offer opt-outs beyond those required under Federal law, so long as the additional information falls within the space constraints of the model form. If the institution chooses to offer its customers an opt-out for its own marketing or for joint marketing, for example, it can provide for that option by stating: "Yes (Check your choices, p.3)" as to the availability of the opt-out.

3. Page Two

(a) *General instructions for the Definitions.* The financial institution must customize the space below the last three definitions in this section (affiliates, nonafffiliates, and joint marketing). This specific information must be in italicized lettering to set off the information from the standardized definitions.

(b) *Affiliates.* As required by section 40.6(a)(3) of this part, the financial institution must identify the categories of its affiliates or state *"[name of financial institution] has no affiliates"* in italicized lettering where *[affiliate information]* appears. A financial institution that shares with affiliates must use, as applicable, the following format: *"Our affiliates include companies with a [name of financial institution] name; financial companies such as [list companies]; and nonfinancial companies, such as [list companies]."*

(c) *Nonaffiliates.* If the financial institution shares with nonaffiliated third parties outside the exceptions in sections 40.14 and 40.15 of this part, the institution must identify the types of nonaffiliated third parties with which it shares or state *"[name of financial institution] does not share with nonaffiliates so they can market to you."* in italicized lettering where [*nonaffiliate information*] appears. A financial institution that shares with nonaffiliated third parties as described here must use, as applicable, the following format: *"Nonaffiliates we share with can include [list categories of companies such as mortgage companies, insurance companies, direct marketing companies, and nonprofit organizations]."*

(d) *Joint Marketing.* As required by section 40.13 of this part, the financial institution must identify the types of financial institutions with which it engages in joint marketing or state *"[name of financial institution] doesn't jointly market."* in italicized lettering where *[joint marketing]* appears. A financial institution that shares with joint marketing partners must use, as applicable, the following format: *"Our joint marketing partners include [list categories of companies such as credit card companies]."*

4. Page Three

Opt-out form. Financial institutions must use page three *only* if they: (1) share or use information in a manner that triggers an opt-out; or (2) choose to provide an opt-out (as disclosed in the table on page 1) in addition to what is required by law. The model opt-out form must be provided on a separate page of the model form.

(a) *Contact us.* The section describes three common methods by which a consumer exercises an opt-out—by telephone, on the Web, and by mail. Financial institutions may customize this section to provide for the particular opt-out methods and options the institution provides. For example, if an institution offers opting out by telephone and the Web but not by mail, it would provide only telephone and Web information as shown in the model form in the "Contact Us" box. Only institutions that allow more than 30 days after providing the notice before sharing information may change the number of days in the lower right hand section of the box.

(b) *Check your choices.* Institutions must display the applicable opt-out options in the "Check your choices" box shown on this page. If an institution chooses not to offer an opt-out by mail, it must delete the boxes for name, address, account number, and mailing directions in the lower right-hand corner of the model form. Financial institutions that only offer one or two of the opt-out options listed on the model form must list only those options from the model form that apply to their practices and correspond accurately to the disclosures on page one. Thus, if an institution does not share in a manner that requires an opt-out for sharing with nonaffiliates, it must not include that opt-out option on page three of the model form. Institutions requiring information from consumers on the opt-out form other than an account number should modify that designation in the "Check your choices" box. Institutions that require customers with multiple accounts to identify each account to which the opt-out should apply should modify that portion of the model form.

(c) *Section 624 opt-out.* If the financial institution's affiliates use information for marketing pursuant to section 624 of the FCRA, and the institution elects to consolidate that opt-out notice in the model form, it must include that disclosure and opt-out election as shown in the model form. Institutions that elect to limit the time for the affiliate marketing opt-out, consistent with the requirements of section 624, must adhere to the requirements of that section and the Agencies' implementing rule with respect to any subsequent notice and opt-out. Institutions that elect to limit the opt-out period must include a statement in italics, as shown on the model form, that states the period of time for which the opt-out applies.

(d) *Additional opt-outs.* A financial institution that uses the disclosure table to indicate any opt-out choices available to consumers beyond those required by Federal law must include those opt-outs on page three of the model form. For example, if the financial institution discloses in the table that it offers an opt-out for joint marketing, the institution must revise the opt-out form on page three to reflect the availability of an opt-out, such as by adding a check-off box with the words "Do not share my personal information with other financial institutions to jointly market to me." Likewise, if a financial institution chooses to offer its customers an opt-out for its marketing, it can provide for that option in the disclosure table and on the opt-out form by adding a check-off box with the words "Do not share [or use] my personal information to market to me."

7. Amend newly redesignated Appendix B by adding a new sentence immediately after the heading:

Appendix B to Part 40—Sample Clauses

This Appendix only applies to privacy notices provided until the date that is on or before one year following the date of final publication of this rule.

* * *

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Federal Reserve System

12 CFR Chapter II

Authority and Issuance

For the reasons set forth in the joint preamble, the Board proposes to amend part 216 of chapter II of title 12 of the Code of Federal Regulations as follows:

PART 216—PRIVACY OF CONSUMER FINANCIAL INFORMATION (REGULATION P)

1. The authority citation for part 216 continues to read as follows:

Authority: 15 U.S.C. 6801 *et seq.*

2. Revise § 216.2 to read as follows:

§ 216.2 Model privacy form and examples.

(a) *Model privacy form.* Use of the model privacy form in Appendix A of this part, consistent with the instructions in Appendix A, constitutes compliance with the notice content requirements of §§ 216.6 and 216.7 of this part, although use of the model privacy form is not required.

(b) *Examples.* The examples in this part are not exclusive. Compliance with an example, to the extent applicable, constitutes compliance with this part.

3. In § 216.6, revise paragraph (f) and add paragraph (g) to read as follows:

§ 216.6 Information to be included in privacy notices.

* * * * *

(f) *Model privacy form.* Pursuant to § 216.2(a) of this part, a model privacy form that meets the notice content requirements of this section is included in Appendix A of this part.

(g) *Sample clauses.* Sample clauses illustrating some of the notice content required by this section are included in Appendix B of this part. Use of a sample clause in a privacy notice provided on or before [DATE ONE YEAR FOLLOWING THE DATE OF PUBLICATION OF THE FINAL RULE], to the extent applicable, constitutes compliance with this part.

4. In § 216.7, add paragraph (i) to read as follows:

§ 216.7 Form of opt-out notice to consumers; opt-out methods.

* * * * *

(i) *Model privacy form.* Pursuant to § 216.2(a) of this part, a model privacy form that meets the notice content requirements of this section is included in Appendix A of this part.

Appendix A [Redesignated as Appendix B]

5. Redesignate Appendix A as Appendix B.

6. Add new Appendix A to read as follows:

Appendix A to Part 216—Model Privacy Form

A. The Model Privacy Form

CALIFORNIA STATE BAR BUSINESS SECTION
FINANCIAL INSTITUTIONS COMMITTEE
APRIL 10, 2007

THE UNIFORM CUSTOMS AND PRACTICES FOR DOCUMENTARY CREDITS (2007 REVISION) (UCP 600)

Andrew Erskine
Countrywide Financial Corporation

1. In October 2006, the International Chamber of Commerce ("ICC") announced adoption of the UCP 600 as a set of new rules for commercial letters of credit. The new rules will become effective ***July 1, 2007.*** The UCP 600 will replace the former ICC rules, designated UCP 500, that were adopted in 1993.

a. The UCP 600, like UCP 500, is not self-executing. It only applies to credits that indicate that they are subject to its rules.

b. Letters of credit generally are subject to Article 5 of the Uniform Commercial Code and, if incorporated in the credit, other sources of law, such as ISP 98 (ICC Publication 590 – intended for application to standby letters of credit; UNCITRAL Convention on Independent Bank Guarantees and Standby Letters of Credit and the SWIFT rules and regulations.

c. Like UCP 500, the focus of UCP 600 is on commercial rather than standby letters of credit.

2. The UCP 600 contains a number of changes that will require review and modification of policies and procedures for banks that issue commercial letters of credit.

3. Time limit for examination of documents. This relates to the period of time a letter of credit issuer has to accept or reject documents presented under a credit. UCP 600 changes the rule to an absolute period of ***five calendar days.*** The rule under UCP 500 was a ***reasonable period of time***. The Article 5 rule, which would be applicable in the absence of incorporating the applicable UCP, would be a reasonable period of time not to exceed seven business days.

a. Where credit incorporates the UCP, it is crucial that the language of incorporation specify the applicable rule-set in the event of a conflict between Article 5 and the UCP. Usually, the UCP should prevail. This is more important now because the new UCP rule and the Article 5 rule cannot be harmonized through interpretation.

4. Rejection of documents. The UCP 500 had two options if noncompliant documents were presented: the issuer could ***reject the tendered documents.*** Or, the issuer could ***hold the tendered documents pending instructions from the presenter.*** The UCP 600 adds two new options: The issuer can handle documents according to ***prior instructions provided by the presenter.*** Or, the issuer can ***hold the documents presented and seek a waiver from the customer.***

a. The latter option – holding the documents and seeking a waiver from the customer – is commonly used today, but is not recognized in UCP 500.

b. Holding documents and seeking a waiver does not extend the five calendar day rule for acceptance or rejection of documents. Accordingly, it is important to specify tight timelines in an issuer's agreement with the customer for responses to requests for waivers.

c. UCP 600 requires a more formal notice to be given by the issuer to the presenter. It must be a ***single notice***, and must state specifically all discrepancies on which the bank refuses to honor. It must further state which of the forgoing options under UCP 600 the issuing bank is exercising.

5. Issuer-proposed amendments. Under UCP 500, the beneficiary could fail to respond to amendments proposed by the issuer without undue risk. Under UCP 600, the beneficiary's acceptance is still required. However, a beneficiary who fails to explicitly accept or reject an issuer-proposed amendment ***will be deemed to have accepted it if it presents documents that comply with the credit and any not-yet-accepted amendment will be deemed an acceptance of the amendment at the time the presentation is made.***

a. The issuing bank is bound by an amendment once it proposes it.

6. Internal inconsistencies in presenting documents. This is a common source of rejection of documents and some believe such rejection is improper. However, the UCP 600 takes relatively subtle steps in this area. The rule of UCP 500 is that ***documents that appear on their face to be inconsistent with one another are noncompliant.*** UCP 600 requires that data in a document cannot be ***in conflict with*** data in another document when read in context with the credit and related documents and international standard banking practice.

b. "International standard banking practice" includes, but is not limited to, ISBP 645.

7. Expanded obligation of advising bank. The UCP 600 provides that an advising bank must be satisfied that the advice it transmits to the beneficiary is accurate. This is consistent with the Article 5 rule, but arguably that rule is supplanted in credits which incorporate UCP 500. UCP 500 only required that the advising bank undertake that the credit is authentic.

8. Expanded liability of issuing bank for delay, etc., in transmission of messages or documents. UCP 500 provides that a bank is not liable for the consequences of delay and/or loss in transit of messages, letters or documents. UCP 600 provides that the bank is not liable under those circumstances ***if the messages or documents are transmitted or sent accordance with the requirements of the credit, or when the bank has chosen the delivery service in the absence of such directions in the credit.***

9. Like UCP 500, UCP 600 is not well suited to standby letters of credit. Accordingly, it is recommended that standby letters of credit be subject to ISP 98, which was expressly designed for standby letters of credit. The areas of difference include the following:

a. ISP 98 explicitly permits the sale of participations and permits disclosure of information about the applicant to participants.

b. ISP 98 permits successive transfers of credits, and explicitly permits the issuer to specify conditions to transfer. under the UCP a credit may be transferred only once, and there is no explicit authority for the establishment of conditions for transfer.

c. ISP time for rejection has three calendar day safe harbor.

d. Presentments may include inconsistent documents.

10. UCP 600 contains a supplement for electronic presentation incorporating provisions of the "eUSP".

11. UCP 600 contains a new article defining significant credit terms. The most significant of these definitions is that for "negotiation", which makes it clear that merely forwarding documents without committing to pay does not constitute "negotiation"; there must be a payment or agreement to pay against presentation.

12. UCP 600 incorporates rules of interpretation, previously scattered throughout the UCP, into one document.

Avoiding Ethical Quagmires:

In-house and Outside Counsel Perspectives on Dealing with Adverse Interests

Mike Zandpour, Esq. – Far East National Bank
Isabelle L. Ord, Esq. – Sheppard Mullin

Special Meeting of the State Bar Financial Institutions Committee in Los Angeles
April 10, 2007

- Avoid getting stuck in ethical quagmires by identifying potential and actual conflicts and applying the Rules of Professional Responsibility to negotiate the path to an ethical resolution.
- Using the Rules of Professional Responsibility, conflicts are easy to spot and monitor even though they may arise in unexpected ways.

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- Conflicts Implicate the Basic Ethical Duties of an Attorney:
  - ✓ The Duty of Loyalty
  - ✓ Thu Duty of Confidentiality
  - ✓ The Duty of Zealous Representation
  - ✓ The Duty of Competence
  - ✓ The Duty of Candor to the Tribunal/Court
  - ✓ The Duty of Diligence
  - ✓ The Duty of Fairness to Opposing Party and Counsel
  - ✓ The Duty to Preserve the Impartiality and Decorum of the Tribunal
  - ✓ The Duty to Act in a Courteous and Professional Manner (??)

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- Rules to Live By: The Rules of Professional Conduct of the State Bar of California
  - ✓ The Rules provide guidance based on the bedrock ethical duties for adverse representation situations.
  - ✓ The ABA Model Rules of Professional Responsibility offer additional guidance.
  - ✓ The California Compendium of Professional Responsibility contains ethics opinions on various conflicts issues.

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The First Question: Who is my Client? How to Tell if you May Have a Conflict.

- Representing Entities
  - The client identified by the engagement letter is the client.
  - If the client is an organization or entity, the "client" is the organization itself acting through its highest representative overseeing the particular engagement. La Jolla Cove Motel & Hotel Apts., Inc. v. Sup. Ct. (Jackman) (2004) 121 Cal.App.4th 773. See Morrison Knudsen Corp. v. Hancock, Rothert & Bunshoft LLP (1996) 69 Cal.App.4th 223 and compare Brooklyn Navy Yard Cogeneration Partners, LP v. Sup. Ct. (The Parsons Corp.) (1997) 60 Cal.App.4th 248.

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CAUTION: Related Entities May Be Clients

- **For conflict purposes related entities may be "clients." See Morrison Knudsen.**
  - ✓ **Integrated in house legal staff**
  - ✓ **Access by lawyer to confidential information material to current representation**
  - ✓ **Access to legal strategy and management**

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CAUTION: Related Entities May Be Clients

- **Officers of the Entity Are Not Official Clients AND Their Interests May Diverge from the Interests of the Entity.**
- **Meehan v. Hopps (1956) 144 Cal.App.2d 284: ("As attorneys for the corporation, counsel's first duty is to it.")**
- **E.F. Hutton & Co., Inc. v. Brown, 305 F.Supp.371 (S.D. Tx 1969): But an implied attorney-client relationship with an officer of a company which reasonably created a belief that the officer was individually represented by the counsel also representing the entity creates a conflict and may result in disqualification of counsel.**

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Representation of Adverse Interests – Don't Get Caught in the Middle!

Rule 3-310. Avoiding the Representation of Adverse Interests

- **Important Definitions:**
  - **"Disclosure" means informing the client or former client of the relevant circumstances and the actual and reasonably foreseeable adverse consequences to the client or former client;**
    - **Relevant circumstances -- "the facts"**
    - **Actual and reasonably foreseeable adverse consequences to the client or former client -- "foreseeable harm"**
  - **"Informed written consent" means the client's or former client's written agreement to the representation following written disclosure;**
    - **Written Disclosure → Written Agreement to the Representation**
  - **"Informed" means communicating information reasonably sufficient to permit the client to appreciate the significance of the matter in question.**

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Rule 3-310 (B)

B. A member shall not accept or continue representation of a client without providing written disclosure to the client where:

1) The member has a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; or
2) The member knows or reasonably should know that:
   a) the member previously had a legal, business, financial, professional, or personal relationship with a party or witness in the same matter; and
   b) the previous relationship would substantially affect the member's representation; or
3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter; or
4) The member has or had a legal, business, financial, or professional interest in the subject matter of the representation.

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Rule 3-310 (B) (Cont.)

- Adequate disclosure to the present client or clients of the member's present or past relationships to other parties or witnesses or present interest in the subject matter of the representation.
- Intended to apply only to a member's own relationships or interests, unless the member knows that a partner or associate in the same firm as the member has or had a relationship with another party or witness or has or had an interest in the subject matter of the representation.
- In-house counsel must facilitate with outside counsel the process of identifying such relationships.
- Outside counsel must be vigilant and proactive in identifying and avoiding conflict situations.

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How Many Ways Are There to Get In To Trouble? Three Big Ones!

1. Concurrent Representation – the duty of loyalty
2. Successive Representation – the duty of confidentiality
3. Switching Employment or Litigation Against a Former Employer – both the duties of loyalty and confidentiality

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Rule 3-310 (C)

C. A member shall not, without the informed written consent of each client:

1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or
   - Subparagraphs (C)(1) and (C)(2) are intended to apply to all types of legal employment, including the concurrent representation of multiple parties in litigation or in a single transaction or in some other common enterprise or legal relationship.
   - In such situations, for the sake of convenience or economy, the parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

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Rule 3-310 (C) (Cont.)

3) **Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.**
   - Subparagraph (C)(3) is intended to apply to representations of clients in both litigation and transactional matters.
   - "Concurrent" representation implicates the duty of loyalty.
   - Representation of two or more clients where their interests are adverse.
   - For Rule 3-310(C)(3) the adverse representation is on separate matters.
   - When evaluating whether a law firm may concurrently represent two clients, even on unrelated matters, it is presumed that duty of loyalty has been breached and counsel is disqualified, unless after full disclosure both clients agree in writing to waive the conflict. See Flatt v.Sup. Ct. (Daniel) (1994) 9 Cal.4th 284-85.

Practical Considerations

- ✓ **Preserving the client relationship -- is a little origination credit worth destroying a great relationship?**
- ✓ **Expense and delay of a disqualification motion**
- ✓ **An actual situation where loyalty is torn**
- ✓ **Clients don't pay for conflicted attorney services**

Rule 3-310 (D)

D. **A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.**
   - **In-House and Outside counsel often deal with special ethical dilemmas in the context of joint representation.**

Competing Interests:
   - **Pros: Presenting united front, controlling witnesses, splitting legal fees, aggregating resources for settlement.**
   - **Cons: difficulties re preserving confidential communications, dealing with differing views as to strategy, differing views on settlement value, dealing with prospective conflicts.**

Concurrent Representation Rules (Cont.)

- **Duty of Loyalty can trump other important duties of the attorney.**
- **The California Supreme Court held in Flatt that requirement of undivided loyalty to existing client negated any duty on part of the attorney to inform prospective client of statue of limitations applicable to proposed lawsuit or even of advisability of seeking alternative counsel.**

Concurrent Representation Rules (Cont.)

- "Ethical screen" does not resolve the issue since these screens are attempts to protect confidential information and it is the duty of loyalty which is violated in concurrent representation.
- Vicarious law firm disqualification: if a lawyer is disqualified, then the entire law firm generally is disqualified. See City & County of San Francisco v. Cobra Solutions, Inc. (2006) 38 Cal.4th 839.

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Concurrent Representation Rules (Cont.)

- The separate matters need not be related in any way, nor is there any requirement that both clients have an interest in both matters. What matters is that one lawyer is representing two clients at the same time when their interests conflict in at least one matter being handled by the lawyer. See Fremont Indemnity Co. v. Fremont General Corp. (2006) 143 Cal.App.4th 50.

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Concurrent Representation Rules (Cont.)

- "The Hot Potato Rule": The conflict is not cured by dropping one client. Once the concurrent conflict arises it can only be cured by informed written consent of both parties. Truck Ins. Exchange v. Firemen's Fund Ins. Co. (1992) 6 Cal.App.4th 1050. See also Pour Le Bebe, Inc. v. Guess (2003) 112 Cal.App.4th 810.
- With the volume and frequency of law firm mergers, addressing conflict issues before the merger is important. Upon merger adverse clients from different law firms are represented by one law firm – hence there is concurrent representation – and automatic disqualification absent dual waivers.
- Outside counsel should set up an early warning mechanism to alert counsel before the conflict strikes. Inside counsel should NEVER have to bring a conflict to the attention of outside counsel.
- Don't let your In-house counsel counterpart get hit by the conflict tsunami; Substituting a firm in the middle of a material litigation matter will likely have significant implications for the client.

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Is There Any Way to Get Out of Trouble? (Also Known as Out of the Frying Pan and Into the Fire)

Waiver Issues

- If previously waived potential conflict turns into an actual conflict, new waiver likely is required. See 3-310(C)(2)
- A prospective waiver should be approached with extreme caution by In-house counsel.

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Case Study on Conflicts:
VISA U.S.A., Inc. v. First Data Corp.
(N.D. Cal. 2003) 241 F.Supp.2nd 1100

Factual Background

- First Data, a credit card processor contracted with Visa to process financial transactions on Visa's behalf. (Fortune 500 company, employed 50 In-house Attorneys)
- In 2001 First Data was sued in an unrelated patent infringement action and retained Heller's Silicon Valley Office as counsel.
- After running conflicts, Heller informed First Data of Heller's longstanding relationship with Visa.
- Heller did not see an actual conflict between the parties, but advised First Data that it could not represent First Data in the Patent infringement case unless First Data agreed to permit Heller to represent Visa in any future disputes "including litigation," that might arise between First Data and Visa.
- First Data consented to those terms which were memorialized in an engagement letter.

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The Engagement Letter

The relevant portions of the engagement letter provided:

Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed our past and on-going representation of Visa U.S.A. and Visa International (the latter mainly with respect to trademarks) (collectively, "Visa") in matters which are not currently adverse to First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.

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Moving From Potential to Actual Conflict

- A few months later, in July 2001, First Data announced its intention to launch a new business initiative which allowed First Data to bypass the Visa regulations on processing certain transactions.
- Visa sued First Data in April of 2002 for Trademark Infringement, dilution, and various breach of contract claims.
- In August 2002 First Data informs Visa that it intends to move to disqualify Heller as counsel for Visa.
- Heller offers to withdraw as counsel on the patent litigations, but First Data insist on Heller staying on.

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First Data's Positions

- First Data contended that under the California Rules of Professional Conduct:
  1) Heller at minimum was required to reaffirm First Data's prospective consent when the actual conflict between Visa and First Data arose.
  2) Heller's Patent lawyers have access to confidential information that Visa could use.

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Heller and Visa's Positions

- **Heller and Visa argued that:**
  - First Data was fully informed about the situation and agreed to allow Heller to represent Visa in future litigation against First Data.
- **Heller and Visa argue that:**
  1) CRPC and other ethical rules expressly permitted written consent to a conflict waiver;
  2) No rules require second consent; and
  3) Ethical Wall protects confidential information.

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Outcome

- **The VISA Court Held:**
  1) Heller was not automatically disqualified from concurrently representing both parties;
  2) Heller's use of the prospective waiver was proper;
  3) Second waiver was not warranted once actual conflict arose;
  4) First Data was knowledgeable and sophisticated user of legal services; and
  5) Heller did not breach its duty of confidentiality.

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Rule 3-310 (E)

E. A member shall not, without the informed written consent of the client or former client, accept employment adverse to the client or former client where, by reason of the representation of the client or former client, the member has obtained confidential information material to the employment.

- Successive Representation Rule
- Intended to protect the confidences of another present or former client
- Implicates duty of confidentiality

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Successive Representation Rules

- Representation of a current client on a matter where the interests of a former client are adverse to the current client.
- The four elements of successive representation conflict rules:
  1) Current representation must be against a former or current client;
  2) Current representation must be adverse to the former or current client;
  3) Lawyer must have obtained confidential information while representing the former client; and
  4) Confidential information must be material to the current representation.

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Successive Representation Rules

- Courts have distinguished between the lawyer in the current matter who had "direct" representation of former client on matter creating the conflict and the lawyer who had only "indirect" contact. See City and County of San Francisco v. Cobra Solutions, Inc.

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Direct Contact

- To determine whether there is a substantial relationship between successive representations, a court must first determine whether the attorney had a direct professional relationship with the former client in which the attorney personally provided legal advice and services on a legal issue that is closely related to the legal issue in the present representation. See Jessen v. Hartford Casualty Ins. Co. (2003) 111 Cal.App.4th 698, 710-711, 3 Cal.Rptr.3d 877.

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Direct Contact (Cont.)

- If such a direct contact is established with the former client, then the attorney is "presumed to possess confidential information, if the subject of the prior representation put the attorney in a position in which [confidential] material to the current representation would normally have been imparted to counsel." See City and County of San Francisco v. Cobra Solutions, Inc.
- If the legal issues are closely related, then disqualification generally is automatic.

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Indirect Contact

- If the lawyer's contact was not direct, but was peripheral or attenuated, then it must be determined whether the lawyer "was in a position vis-'a-vie the client to likely have acquired confidential information material to the current representation." Jessen, 111 Cal.App.4th at 710.
  - The court examines both:
    1. the attorney's relationship to the prior client; and
    2. the relationship between the prior and present representation. See City and County of San Francisco
- Prior client has to make some showing of the nature of the communications or a statement of how they relate to the current representation.

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Changing Jobs: Does it Create a Conflict, and If So, What Steps Must Be Taken?

- Former in-house counsel may represent a client in a matter adverse to the former employer unless he personally represented the former employer in the same or a substantially related matter OR another attorney in the in-house legal department represented the employer in the previous matter and the lawyer acquired protected information.
- Even employment of non-attorney employees or experts may create a conflict if the employee or expert has confidential information relating to a client or a matter. Shadow Traffic Network v. Superior Court (1994) 24 Cal.App.4th 1067.

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Oops, I Think I Have a Conflict. How Bad Can It Get?

1) Disclosure to the Client
2) Disqualification
3) Vicarious Disqualification
4) No Payment of Fees to Conflicted Counsel and Disgorgement of Fees by Conflicted Counsel
5) Reversal of Civil Judgment Due to Conflict
6) Professional Discipline

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Vicarious Law Firm Disqualification

- In concurrent representation conflict cases, the current rule appears to result in a *per se* disqualification of the law firm.
- In successive representation conflict cases, it is not clear whether there is a *per se* disqualification of the law firm.
- In City and County of San Francisco, *supra*, the California Supreme Court did not clearly bar exceptions.

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Former In-House Counsel Suing Former Employer: What Can Be Revealed and What Must Remain Confidential?

- The Former In-House Counsel may sue his former employer but may not publicly disclose confidential information of the former employer. Fox Searchlight Pictures, Inc. v. Paladino (2001) 89 Cal.App.4th 294; General Dynamics Corp. v. Superior Court (1994) 7 Cal.4th 1164. ("We conclude there is no reason inherent in the nature of an attorney's role as in-house counsel to a corporation that in itself precludes the maintenance of a retaliatory discharge claim, *provided* it can be established without breaching the attorney-client privilege or unduly endangering the values lying at the heart of the professional relationship.")

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Proactive Measures to Avoid Conflicts Before They Arise:

- Rule No. 1: Conflicts do not get better with time and they never cure themselves. Handle potential conflict situations promptly and professionally.
- Engagement letters should clearly identify the client and the scope of the representation. Both client and counsel should be clear on counsel's involvement, if any, extending beyond identified client.
- Outside counsel must have a mechanism in place to identify potential conflicts promptly. In-house counsel must have confidence their outside counsel will bring potential conflicts to their attention.
- Waivers should be clear as to how confidential information is to be protected.
- Both client and counsel should approach joint representation with extreme caution.
- Prospective waivers should be scrutinized and be clear on which options the client and counsel have.

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Conclusion: Rising Above the Quagmire

- The potential for conflicts always exists. The ethical practitioner knows how to spot problems and where to look for the Rules of Professional Conduct that will provide guidance.
- Ethical counsel provide great client service.
- Proactive consideration of ethical issues by in-house counsel prevents costly and embarrassing problems.
- Ethical outside counsel spot and avoid ethical problems, saving the client money and preserving important client relationships.
- The ethical practitioner will never have to answer this question:

"HOW DID THIS HAPPEN!!??"

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